Supreme Court, U.S.
FILED
JUL 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2033

In The

Supreme Court of the United States

October Term, 1988

PETE ROBERTS,

Petitioner,

v.

SUN EXPLORATION AND PRODUCTION COMPANY, a Delaware Corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May federal courts examine the merits of a claim under 29 U.S.C. §185 where the matter has been resolved in accordance with a collectively bargained grievance procedure which does not include binding arbitration?

TABLE OF CONTENTS

Page

Question Presented for Review i

Table of Contents ii

Table of Authorities iii

Counter-Statement of the Case 1

Reasons for Denying the Writ 3

Proposition One: The LMRA Provides That Parties May Agree On a Grievance Procedure Which Does Not Include Binding Arbitration 4

Proposition Two: The Alleged Conflicting Decisions of the Circuits Relied Upon By Roberts Are Distinguishable 6

Conclusion 8

TABLE OF AUTHORITIES

Page

CASES

Brown v. Sterling Aluminum Products Corp., 365 F.2d 651 (8th Cir. 1966) 6, 7

DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983) 4

Fortune v. National Twist Drill & Tool Div., 684 F.2d 374 (6th Cir. 1982) 6

General Drivers Union v. Riss & Co., 372 U.S. 517 (1963) 5

Haynes v. United States Pipe & Foundry Co., 362 F.2d 414 (5th Cir. 1966) 6, 7

Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976) 4

Huffman v. Westinghouse Elec. Corp., 752 F.2d 1221 (7th Cir. 1985) 5, 6

Electrical Contr. Ass'n v. International Brotherhood of Electrical Workers, 458 F.2d 590 (1st Cir. 1972) 6

Line Drivers Local No. 961 v. W. J. Digby, Inc., 341 F.2d 1016 (10th Cir. 1965) 7

Lomax v. Armstrong Cork Co., 433 F.2d 1277 (5th Cir. 1970) 6

Paperworkers v. Misco, Inc., 484 U.S. 29 (1987) 4

Smith v. Evening News Ass'n, 371 U.S. 195 (1962) 4

Smith v. Kerrville Bus Co., 748 F.2d 1049 (5th Cir. 1984) 7

Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) 4

TABLE OF AUTHORITIES – Continued

Page

United Brotherhood of C & J v. Hensel Phelps Construction Co., 376 F.2d 731 (10th Cir. 1967) 7

United Mine Workers v. Barnes & Tucker Co., 561 F.2d 1093 (3rd Cir. 1977) 6

United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) 5

Vaca v. Sipes, 386 U.S. 171 (1967) 4

W.R. Grace & Co. v. Local 759, 461 U.S. 757 (1983) 4

OTHER AUTHORITIES

29 U.S.C. §173(d) (1982) 4

29 U.S.C. §185 (1982) 2

1947 U.S. Code Cong. & Ad. News 1135, 1168-1169 5

Sen. Rep. No. 105, April 17, 1947, 80th Cong., 1st Sess. 1, reprinted in Legislative History of the Labor Management Relations Act, 1947, at pp. 434-35 5

Supreme Court Rule 17.1 3

COUNTER-STATEMENT OF THE CASE

Pete Roberts ("Roberts") is the petitioner. Oryx Energy Company, a Delaware corporation, formerly Sun Exploration and Production Company, a Delaware corporation ("Sun"), is the respondent.[1]

Roberts filed a complaint[2] against Sun in the United States District Court for the Western District of Oklahoma alleging wrongful discharge. The terms and conditions of Roberts' employment were governed by a collective bargaining agreement between Sun and Roberts' bargaining representative, the Sun Exploration and Production Company Employees Association ("Association"). Roberts, as a member of the bargaining unit, was bound by the terms of the collective bargaining agreement. The agreement contained a five step grievance procedure for resolving disputes, such as disciplinary action taken against bargaining unit members. The grievance procedure was exclusive. The grievance procedure steps included review

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[1] Pursuant to Supreme Court Rule 28.1, the respondent discloses the following information: Sun Exploration and Production Company, a Delaware corporation, was renamed Oryx Energy Company on May 3, 1989. Oryx Energy Company is the managing general partner and principal owner of Sun Operating Limited Partnership, a Delaware limited partnership. Oryx Energy Company has no other parent, subsidiary or affiliated companies. The respondent will be referred to by its designation in the lower courts.

[2] The complaint was actually styled as a petition, but will be referred to herein as a complaint. The complaint alleged diversity jurisdiction contrary to the assertion of federal question jurisdiction alleged by Roberts in the writ for certiorari. *Compare* Writ for Certiorari, p. 6 and Appendix, p. A-5.

by the Governing Board of the Association, and culminated in final review by Sun's Vice President for Production Operations. The parties to the collective bargaining agreement chose to exclude arbitration as the final step in the grievance procedure. Roberts' discharge was reviewed in accordance with the agreed upon grievance procedure,[3] and his discharge was upheld by Sun's Vice President for Production Operations.

The United States District Court for the Western District of Oklahoma granted Sun's motion for summary judgment, holding that the case was preempted by § 301 of the Labor Management Relations Act, 1947 ("LMRA"), 61 Stat. 156, 29 U.S.C. § 185 (1982). The United States Court of Appeals for the Tenth Circuit affirmed the district court's conclusion that Roberts' claim was preempted by federal labor law. The Tenth Circuit held that the grievance procedure contained in the collective

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[3] There was some confusion at the district court level concerning whether Roberts did exhaust his remedies under the grievance procedure. As noted in the briefs on the motion for summary judgment, Roberts did *not* exhaust his remedies concerning his *suspension*, but did follow the grievance procedure and thereby exhaust his remedies with respect to his discharge. The district court was apparently confused when it held that Roberts failed to pursue his grievance under the collective bargaining agreement. *See* Appendix, A-11. However, the Tenth Circuit was apprised of this issue and affirmed the districts court's determination that Roberts' claim was preempted and that the grievance procedure in the collective bargaining agreement was the exclusive means of raising issues relating to his termination. *See* Appendix, A-4, and Brief of the Appellee, pp. 12-13, Tenth Circuit Case No. 87-2019.

bargaining agreement was the exclusive means of resolving the issues relating to Roberts' termination.

REASONS FOR DENYING THE WRIT

Supreme Court Rule 17.1 provides that a writ of certiorari will be granted "only when there are special and important reasons therefore." Roberts has not asserted any such "special and important reasons" in his Petition for Writ of Certiorari.

Roberts' primary contention is that the federal courts must make themselves available for the parties to litigate all disputes arising under a collective bargaining agreement if the agreement's grievance procedure does not conclude with binding arbitration. Roberts asserts that there is a split among the circuits on whether his contention is correct.

This Court's interpretations of the LMRA and its legislative history indicate that collective bargaining agreements may properly contain a grievance procedure which does not include binding arbitration. This Court has ruled that if a party has pursued his grievance to the final step in the procedure, the federal courts may not reexamine the merits of the grievance. Furthermore, there is no split among the circuits on whether a grievance procedure must contain a provision for binding arbitration to preclude litigation of disputes submitted to the court.

PROPOSITION ONE: THE LMRA PROVIDES THAT PARTIES MAY AGREE ON A GRIEVANCE PROCEDURE WHICH DOES NOT INCLUDE BINDING ARBITRATION.

A party may bring an action for breach of a collective bargaining agreement under § 301 of the LMRA. *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962). However, if the grievance procedure contained in the collective bargaining agreement provides for a final and binding decision of disputes submitted to it, then a dispute finally resolved under that procedure may not be reviewed on the merits by the federal courts. *See Paperworkers v. Misco, Inc.*, 484 U.S. 29 (1987); *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 164 (1983), citing *W.R. Grace & Co. v. Local 759*, 461 U.S. 757, 764 (1983); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976). A federal court may review a decision rendered under a final and binding grievance procedure only to determine whether the decision drew its essence from the collective bargaining agreement and to ascertain whether the grievant's union breached its duty of fair representation.[4] *Vaca v. Sipes*, 386 U.S. 171, 186 (1967); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960).

Section 203(d) of the LMRA, 61 Stat. 154, 29 U.S.C. § 173(d) (1982), provides that the "method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining

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[4] In the present case, Roberts did not alleged either of these exceptions to the finality rule at the district court level, nor did he allege the exceptions on appeal until his reply brief to the Tenth Circuit.

agreement." Congress specifically rejected the requirement that disputes under the LMRA be resolved by means of compulsory arbitration. *See* Sen. Rep. No. 105, April 17, 1947, 80th Cong., 1st Sess. 1, reprinted in Legislative History of the Labor Management Relations Act, 1947, at pp. 434-35; 1947 U.S. Code Cong. & Ad. News 1135, 1168-1169.

This Court has construed the LMRA as requiring the lower federal courts to defer to whatever procedure for settling disputes is contained in the collective bargaining agreement, even if that procedure does not conclude with binding arbitration. *See General Drivers Union v. Riss & Co.*, 372 U.S. 517, 521 (1963); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 565 (1960). This Court's decisions support the sound labor policy of allowing the parties to determine their own grievance procedure through the collective bargaining process. This principle was clearly stated in *Huffman v. Westinghouse Elec. Corp.*, 752 F.2d 1221 (7th Cir. 1985):

> Collective bargaining is a process by which both the union and the employer concede certain points in order to gain advantages elsewhere. If the grievance procedure under this contract favors the employer, the Union (and therefore the employees) presumably gained something in return. We do not, therefore, find convincing the employees' argument that they should be able to escape the terms of the contract the Union bargained for them because another contract might have been more favorable.

Huffman, 752 F.2d at 1226.

The absence of binding arbitration from a grievance procedure does not warrant the federal courts to

reexamine the merits of a case which has already been resolved under the agreed upon procedure.

PROPOSITION TWO: THE ALLEGED CONFLICTING DECISIONS OF THE CIRCUITS RELIED UPON BY ROBERTS ARE DISTINGUISHABLE.

Roberts asserts that the circuits have rendered conflicting decisions on whether a grievance procedure must include binding arbitration to invoke the finality rule under § 301 of the LMRA. Petition for Writ of Certiorari, p. 11. The First, Third, Fifth, Sixth, Seventh and Tenth Circuits have all held that binding arbitration is not required for the finality rule to be invoked. *See Huffman*, 751 F.2d at 1226; *Fortune v. National Twist Drill & Tool Div.*, 684 F.2d 374, 375 (6th Cir. 1982); *United Mine Workers v. Barnes & Tucker Co.*, 561 F.2d 1093, 1096 (3rd Cir. 1977); *Electrical Contr. Ass'n v. International Brotherhood of Electrical Workers*, 458 F.2d 590, 592 (1st Cir. 1972); *Lomax v. Armstrong Cork Co.*, 433 F.2d 1277, 1280-1281 (5th Cir. 1970); *Haynes v. United States Pipe & Foundry Co.*, 362 F.2d 414, 418 (5th Cir. 1966); and the opinion of the Tenth Circuit in the present case.

Roberts cites *Brown v. Sterling Aluminum Products Corp.*, 365 F.2d 651 (8th Cir. 1966), for the proposition that an impartial arbiter is required for the finality rule to be invoked. Petition for Writ of Certiorari, p. 9. However, the grievance procedure in *Brown* did not contain a provision for a final and binding decision, and as such is distinguishable from the grievance procedure in the present case.

In *Brown*, the appellants were seeking the specific enforcement of a general agreement to discuss grievances contained in the collective bargaining agreement at issue. The third and final step of the grievance procedure in *Brown* provided that if the parties were unable to settle the matter, they would diligently and in good faith explore some other method for the final disposition of the dispute. *Brown*, 365 F.2d at 658. The court held that the federal judiciary should not be used to enforce a contract that merely requires the parties to discuss their differences. *Id.* The absence of a provision in the grievance procedure for a final and binding decision is what distinguishes *Brown* from the present case. The agreement between Sun and the Association expressly provides that the decision made in the last step is final.

The rudimentary grievance procedures at issue it the two Tenth Circuit decisions cited by Roberts,[5] neither of which include the authority to make a final and binding decision, distinguish those cases from the present case. Likewise, the lack of authority to make a final and binding decision under the grievance procedure in *Smith v. Kerrville Bus Co.*, 748 F.2d 1049 (5th Cir. 1984), cited by Roberts, distinguishes it from the Fifth Circuit case of *Haynes*.

The circuits have consistently held that a litigant may not use the absence of a provision for binding arbitration in a grievance procedure as the basis for reexamining the

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[5] Petition for Writ of Certiorari, p. 9, citing *United Brotherhood of C & J v. Hensel Phelps Construction Co.*, 376 F.2d 731 (10th Cir. 1967) and *Line Drivers Local No. 961 v. W. J. Digby, Inc.*, 341 F.2d 1016 (10th Cir. 1965).

merits of the grievance where the grievance procedure provides for a final and binding decision.

CONCLUSION

There is no split of authority among the circuits as asserted by Roberts. There are no "special and important reasons" for this Court to grant the petition. For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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July 14, 1989
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